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Supreme Court, U.S.
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No. 00-1506

In The

Supreme Court of the United States

CASH AMERICA INTERNATIONAL, INC.
AND CASH AMERICA OF ALABAMA, INC.,

Petitioners,

v.

KEVIN SPARKS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Cash America raised any constitutional issue in the proceedings below or preserved any federal question for review.

2. Whether the Alabama Supreme Court opinion rests on adequate state grounds and whether the question of the proper standard of review for an award of punitive damages is well settled.

3. Whether Cash America's right to due process was violated or infringed in any way.

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BRIEF IN OPPOSITION

Kevin Sparks (who may be referred to hereinafter as "Sparks") respectfully petitions this Honorable Court to deny Cash America's petition for writ of certiorari to review the judgment of the Alabama Supreme Court in *Kevin Sparks v. Cash America International, Inc., et al.*, 2000 WL 1880336 (Ala. Dec. 29, 2000) and the judgment of the trial court which is re-printed in the Appendix to Cash America's Petition for Writ of Certiorari.

OPINIONS BELOW

The Alabama Supreme Court issued the opinion that is the basis of this appeal on December 29, 2000. The opinion is published at 2000 WL 1880336 (Ala. Dec. 29, 2000) and re-printed in the Appendix to Cash America's Petition for Writ of Certiorari. The opinion and order of the Mobile County Circuit Court is unpublished but has been re-printed in the Appendix to Cash America's Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The Plaintiff, Kevin Sparks, filed the instant lawsuit against Cash American International, Inc., Cash America of Alabama, Inc. (hereinafter Cash America), and Bill Ewing, alleging fraudulent misrepresentation, fraudulent suppression, breach of contract and other causes of action on March 3, 1997. At the end of a four day trial the court charged the jury on breach of contract and fraud, the

elements of mental anguish and emotional distress, and punitive damages. (R-894-903). On June 5, 1998, after deliberating for most of the afternoon, the jury returned a verdict in favor of the Plaintiff and against Cash America in the amount of one million one hundred and fifty thousand dollars ($1,150,000.00). (R-927). The jury assessed compensatory damages at $150,000.00 (which the parties agree included approximately $25,000.00 for actual economic loss and $125,000.00 for mental anguish) and punitive damages in the amount of $1,000,000.00. (R-927).

On June 19, 1998, Cash America filed a Motion for Judgment as a Matter of Law, Or in the Alternative, For a Remittitur or New Trial. (C-885). Cash America asserted that the punitive damage award was excessive and the mental anguish component of the compensatory damage award should be remitted or vacated.

On July 10, 1998, the trial court held a brief hearing on Cash America's motions and on August 7, 1998 the court entered an order remitting the compensatory damage award to $75,000.00 and the punitive damage award to $225,000.00, thereby reducing the total award to $300,000.00 (R-3-43, C-1150). The trial court unconditionally denied Cash America's motion for new trial and for judgment as a matter of law, yet granted the motion for remittitur. The order did not give Sparks the option of rejecting the remittitur and requesting a new trial as is required under Alabama law. (C-1150). Several other post-trial motions were filed in an effort to urge the trial court to correct its deficient order and both parties eventually filed appeals to the Alabama Supreme Court on procedural and substantive grounds.

On November 27, 2000 the Alabama Supreme Court released a *per curiam* opinion which affirmed the decision of the trial court conditioned upon the trial court granting Sparks the option of requesting a new trial as an alternative to the remittitur. Both parties subsequently filed applications for rehearing. Sparks petitioned for rehearing based upon the fact that the Alabama Supreme Court did not review the reduction of the award of compensatory damages by the trial court. Cash America's Application for Rehearing was based largely upon factual issues and did not address any constitutional provision, federal question, or any issue which it now raises in its Petition for Writ of Certiorari to this Honorable Court. On December 29, 2000 the Alabama Supreme Court withdrew the November 27, 2000 opinion and substituted a new opinion which was almost identical to the original opinion except that it ordered a new trial unless Sparks accepted the remittitur within twenty-eight days, effectively taking the responsibility of correcting the deficient order away from the trial court. The opinion stated that the award of punitive damages, which was considered by the trial court in pre-trial and post-trial motions, was supported by clear and convincing evidence. (Pages 18a-23a, Cash America's Petition for Writ of Certiorari).

STATEMENT OF DISPUTED AND/OR OMITTED FACTS

Sparks has previously provided a detailed Statement of Facts to this Honorable Court in his Conditional Cross-Petition for Writ of Certiorari (No. 00-1654) which was

docketed on May 2, 2001. Therefore, Sparks will include only those facts which are disputed or which have been omitted from Cash America's Petition for Writ of Certiorari.

After the trial of this matter Cash America filed a Motion for Judgment as a Matter of Law, Or in the Alternative, For a Remittitur or New Trial requesting that the trial judge reduce the jury verdict awarded to Sparks based upon various grounds. Both parties filed thorough written briefs and supporting documentary evidence prior to the hearing. The trial court carefully considered the evidence at the hearing and eventually issued a seventeen (17) page written order outlining every factor related to the reasonableness of a punitive damage award enunciated in this Court's opinion in *BMW of North America v. Gore*, 116 S. Ct. 1589 (1995).

Contrary to Cash America's assertion that the trial judge "found none of the aggravating factors which would support a significant sanction in addition to the compensatory damages" the trial court stated "that the testimonial and documentary evidence presented at trial was sufficient to support the Plaintiff's claims for fraud and breach of contract and that there was evidence from which a jury could reasonably infer that the Defendants' conduct was gross, oppressive, or malicious justifying an award of punitive damages." (Pages 4 and 3a, Cash America's Petition for Writ of Certiorari). The trial court did not find that there was no element of reprehensibility, only that Cash America's conduct was not reprehensible enough to sustain the original punitive verdict of one million dollars. In its remittitur order the trial court

addressed: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of punitive damages to the amount of actual or potential harm suffered by the plaintiff; (3) a comparison of the amount of the jury's verdict with civil or criminal penalties that could have been imposed under the law for comparable misconduct; (4) the harm likely to occur and the harm that actually occurred as a result of the defendant's conduct; (5) the financial gain to the defendant from its behavior; (6) the financial position of the defendant; (7) the expense of litigation; (8) any available criminal sanctions; and (9) similar civil actions against the defendant. (Pages 1a-17a, Cash America's Petition for Writ of Certiorari). After conducting a thorough analysis pursuant to *BMW of North America v. Gore*, 116 S. Ct. 1589 (1995) the trial court concluded that the punitive damage award of one million dollars ($1,000,000.00) was grossly excessive and therefore reduced the award to two hundred twenty-five thousand dollars ($225,000.00) based upon the factors listed above.

Both parties appealed from the trial court's remittitur order and the Alabama Supreme Court affirmed the award of compensatory and punitive damages conditioned upon Sparks' acceptance of the remittitur. In its brief to the Alabama Supreme Court, Cash America agreed that the trial court's remittitur order, which substantially reduced the punitive damage award, was "well-reasoned and thorough" and that the trial judge presided over the case with "considerable attentiveness." (Page 64, Cash America's Brief to the Alabama Supreme Court).

It is evident that the Alabama Supreme Court relied, at least to some extent, upon the trial judge's "well

reasoned and thorough" order in affirming the punitive damage award in a *per curium* opinion. The Alabama Supreme Court wrote:

> On its cross-appeal, Cash America asks this Court to reverse the original judgment of the trial court and render a judgment in its favor. Cash America contends that it was entitled to a JML [Judgment as a Matter of Law] on the counts that went to the jury, specifically, Sparks's breach-of-contract and fraud claims. Cash America argues that Sparks's claims relating to the payment of his 1995 incentive bonus should have been dismissed, as a matter of law, because Cash America, it argues, was not contractually obligated to pay Sparks a specific bonus amount. Cash America argues that Sparks presented no evidence to prove any of the elements of promissory fraud or fraudulent suppression and that the award of punitive damages is not supported by clear and convincing evidence. We disagree.
>
> The trial court considered these contentions on several occasions – on pretrial motions for summary judgment; on motions for a JML after the close of the plaintiff's case; and at the close of all of the evidence. The trial court concluded that Sparks had presented substantial evidence on these claims, evidence that created a question for the jury to resolve. The record supports the court's conclusion. The jury had before it evidence from which it could find that Cash America had breached its contract with Sparks and/or had suppressed material facts. See *Talent Tree Personnel Servs., Inc. v. Fleenor*, 703 So. 2d 917 (Ala. 1997).

Although the Alabama Supreme Court did not conduct a line-by-line analysis of the punitive damage award, it clearly reviewed the record and the trial judge's "well-reasoned and thorough" seventeen (17) page remittitur order in affirming the award.

After the original Alabama Supreme Court opinion was released on November 27, 2000 both parties filed applications for rehearing. Sparks filed his application because the court did not address the reduction of the mental anguish component of the jury verdict. Cash America petitioned for rehearing largely based upon factual issues and sufficiency of the evidence grounds. Cash America's Application for Rehearing **did not raise any constitutional issue and did not cite any federal authority at all.** (App. 1-App. 8).

REASONS FOR DENYING THE PETITION

1. Cash America did not raise any constitutional issue in the proceedings below or preserve any federal question for review.

In its original appeal brief to the Alabama Supreme Court, Cash America did not raise any constitutional question and did not allege that its right to due process was denied by the trial court and/or would be further denied unless the court conducted a line-by-line punitive damages analysis. The *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996), case was cited in Cash America's original appeal brief largely for the proposition that Sparks did not present sufficient evidence to sustain an award of punitive damages. However, both the trial court

and the Alabama Supreme Court disagreed when they each stated that there was "substantial evidence" from which a jury could conclude that Cash America breached its contract with Sparks and fraudulently suppressed facts that it had a duty to disclose.

Furthermore, after the court released its original opinion on October 27, 2000 Cash America filed an application for rehearing. Cash America's application did not address any constitutional issue or federal question, raise any due process argument, or cite any federal statute or authority whatsoever. The language in the October 27, 2000 opinion relating to the award of punitive damages, which is excerpted above, is identical to the language in the December 29, 2000 opinion that was released on rehearing. The only change in the opinion was that the Alabama Supreme Court ordered Sparks to file a remittitur unless he wanted to have a new trial granted instead of leaving it to the trial court to make that order as in the October 27, 2000 opinion. Therefore, Cash America had ample opportunity after the release of the October 27, 2000 opinion to raise the due process argument that it now raises but utterly failed to do so. Instead, Cash America opted to make sufficiency of the evidence arguments as it did in its original appeal brief. A copy of Cash America's application for rehearing to the Alabama Supreme Court has been reprinted in the appendix to this brief for your review. The application does not reference a single federal issue.

This Honorable Court has repeatedly held that it will take jurisdiction of a case only when a federal question or constitutional issue was raised and decided in the court below, not when it simply might have been raised. *See*

Mutual Life Insurance Company v. McGrew, 1903 S. Ct. 61, 188 U.S. 291, 47 L. Ed. 480, 23 S. Ct. 375 (1903); *Sayward v. Denny*, 158 U.S. 180, 39 L. Ed. 941, 15 Sup. Ct. Rep. 777 (1895); *Zadig v. Baldwin*, 166 U.S. 488, 41 L. Ed. 1088, 17 Sup. Ct. Rep. 639 (1897); *F.G. Oxley Stave Co. v. Butler County*, 166 U.S. 648, 41 L. Ed. 1149, 17 Sup. Ct. Rep. 709 (1897). Furthermore, this Court has held that an attempt to raise a constitutional issue in a state appeals court in an application for rehearing is too late unless the constitutional issue could not have been anticipated. *Herndon v. Georgia*, 1935 S. Ct. 475, 295 U.S. 441, 55 S. Ct. 794, 79 L. Ed. 1530 (1935). The present case presents a clearer argument for this Court to refuse to take jurisdiction because Cash America failed to even mention a constitutional issue in its application for rehearing.

2. The Alabama Supreme Court opinion rests on adequate state grounds and the question of the standard of review for an award of punitive damages is well settled.

The law concerning the appropriate standard of review for an award of punitive damages is well settled in Alabama. Alabama Code § 6-11-24 (1975) states:

> (a) On appeal, no presumption of correctness shall apply to the amount of punitive damages awarded.
>
> (b) The appellate court shall independently reassess the nature, extent and economic impact of such an award and reduce or increase the award if appropriate in light of all the evidence.

Contrary to what Cash America argues in its petition for certiorari, Alabama already has a long-standing *de novo* standard of review for punitive damage awards which is in line with the recent *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, U.S. S. Ct. Petition No. 992035 (May 14, 2001) case. Alabama appellate courts have been reviewing punitive damage awards under a *de novo* standard since Alabama Code § 6-11-24 (1975) was enacted in 1987, which is long before *Cooper v. Leatherman* was decided. *Id.*

Just as it is a well established principal that it must affirmatively appear from the record that a federal question was presented to the highest court of the state in order for this Court to assume jurisdiction of a case, it is also established that this Court will decline to review state court judgments which rest on independent and adequate state grounds. *See Honeyman v. Hannan*, 300 U.S. 14, 18 (1937); *Lynch v. New York*, 293 U.S. 52 (1934); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935); Section 25 of the Judiciary Act of 1789, c. 20, 1 Stat. 85-87. In the present case, the decision of the Alabama Supreme Court rests upon adequate state grounds and which do not conflict with federal law.

3. Cash America's right to due process was not violated or infringed in any way.

By Cash America's own admission the trial judge was very "attentive" and conducted a "well-reasoned and thorough" review of the punitive damage award. After the one million one hundred fifty thousand dollar ($1,150,000.00) verdict was rendered by a jury both parties submitted extensive briefs and argued the matter at a

hearing. The trial judge then issued his "well-reasoned and thorough" seventeen (17) page order which outlined each and every *BMW v. Gore* factor and resulted in an extensive reduction of the compensatory and punitive awards to three hundred thousand dollars ($300,000.00). The Alabama Supreme Court subsequently reviewed the record and the trial judge's "thorough" remittitur order and conditionally affirmed the award. The Alabama Supreme Court held:

> The trial court concluded that Sparks had presented substantial evidence on these claims, evidence that created a question for the jury to resolve. The record supports the court's conclusion. The jury had before it evidence from which it could find that Cash America had breached its contract with Sparks and/or had suppressed material facts.

Just because the Alabama Supreme Court opinion did not contain a line-by-line analysis of each and every *BMW v. Gore* factor does not mean that it did not review the matter *de novo* and render its opinion accordingly. As Cash America points out in its petition for writ of certiorari, the Alabama Supreme Court is eminently aware of its responsibilities with regard to reviewing punitive damage awards for excessiveness since *BMW v. Gore*. *See Wal-Mart Stores, Inc. v. Goodman*, No. 1981683, 2000 WL 1868437 (Ala. Dec. 22, 2000). In fact the *Wal-Mart* case, which Cash America cites for this proposition, was decided the week before the case which is under consideration here was released. In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, U.S. S. Ct. Petition No. 992035 (May 14, 2001), which Cash America relies upon for the proposition that it was denied due process, the trial court

declined to reduce the punitive damages award. However, in the present case the trial judge gutted the original jury verdict, reducing it by over eight hundred thousand dollars ($800,000.00). Furthermore, unlike the appeals court in *Cooper*, the Alabama Supreme Court reviewed the award of punitive damages *de novo* pursuant to Alabama Code § 6-11-24 (1975), found that there was "substantial evidence" to support the award, and conditionally affirmed the case on procedural grounds. Sparks is aware of no authority that requires an appeals court to even issue a written opinion or to issue an opinion containing a line-by-line analysis of an award of punitive damages. It should suffice that the trial judge issued a "thorough and well-reasoned" remittitur order outlining each and every *BMW* factor, which the Alabama Supreme Court reviewed along with the record, in conditionally affirming the award. If there is any state appeals court in the land that is familiar with its obligations under *BMW* surely it is the Alabama Supreme Court. Cash America should not be heard to complain of alleged due process violations when the trial court substantially reduced the verdict to begin with and the Alabama Supreme Court reviewed the case *de novo*.

CONCLUSION

Cash America did not preserve its right to have its appeal heard by this Honorable Court because it failed to raise any constitutional due process argument in its original appeal brief and failed to raise any such argument in its application for rehearing which it filed after the October 27, 2000 Alabama Supreme Court opinion was

released. Cash America cannot be heard to complain about its right to due process for the first time on appeal to the United States Supreme Court. Additionally, Alabama adopted a *de novo* standard of review in 1987 when it enacted Alabama Code § 6-11-24 (1975). There is no conflict between Alabama state law and federal law on this subject and Alabama Code § 6-11-24 (1975) is consistent with this Honorable Court's recent decision in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, U.S. S. Ct. Petition No. 992035 (May 14, 2001). Furthermore, the trial court and the Alabama Supreme Court conducted a review of the punitive damage award and both found that it was supported by "substantial evidence." Wherefore, Sparks respectfully requests that this Honorable Court deny Cash America's petition for writ of certiorari.

Respectfully submitted,

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IN THE SUPREME COURT OF ALABAMA

Case No. 1972125

KEVIN SPARKS,
Appellant/Cross-Appellee,

vs.

CASH AMERICA INTERNATIONAL, INC., et al.,

Appellees/Cross-Appellants.

ON APPEAL FROM THE CIRCUIT COURT OF
MOBILE COUNTY, ALABAMA
CIVIL ACTION NUMBER CV-97-683

APPLICATION OF CASH AMERICA INTERNATIONAL, INC. AND CASH AMERICA, INC. OF ALABAMA FOR REHEARING AND BRIEF IN SUPPORT THEREOF

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I. INTRODUCTION

Pursuant to Rule 40 of the *Alabama Rules of Appellate Procedure*, Cash America of Alabama, Inc. and Cash America International, Inc. (collectively, "Cash America") respectfully submit this application for a rehearing of this court's October 27, 2000 opinion, as that opinion relates to Cash America's cross-appeal. *Talent Tree Personnel Services, Inc. v. Fleenor*, 703 So.2d 917 (Ala. 1997), relied upon exclusively by the court in rejecting Cash America's cross-appeal, is a sales commission case and is therefore not applicable to this incentive bonus case. Cash America respectfully asserts that there is no substantial evidence in the Record to support Kevin Sparks's ("Sparks") claims for breach of contract and/or intentional fraud, and insufficient evidence in the Record to support his mental anguish and punitive verdict as remitted. Cash America urges the Court to apply the law to the following facts:

II. SALIENT FACTS

1. Sparks's lawsuit centers on an incentive bonus plan, as Sparks, along with every other witness, admits. (C-332, 406-407; R-476-477; 492-493; 525-526) Sparks has never claimed that he was entitled to earned sales commissions. (C-263; R-211, 304-305, 420)

2. Bill Ewing, Sparks's supervisor and the sole individual defendant below, was expressly found innocent of any wrongdoing and exonerated by the jury. (R-927)

3. Sparks testified that Cash America's home office never "hid" *anything* from him. (R-212, 235, 327-329)

4. Terry Kuntz was not called as a witness at trial, and thus there was *no* evidence of Kuntz's state of mind (and therefore of Cash America's intent) at the time Kuntz allegedly made a false promise to Sparks.

5. Sparks expressly testified that he *never relied*, in any fashion, upon receiving a bonus in excess of $24,000, and Cash America expressly disagreed to pay Sparks a bonus in excess of $24,000 (R-330-332, 589)

6. Sparks's "mental anguish" is based solely on his testimony that he "felt like somebody had cut [his] arms and legs off" after *receiving* a $7,500 bonus. (R-213-214, 238) Sparks's subsequent visits to Thomas Hospital were unrelated to the instant claim, according to Sparks's treating physician. (C-1232, 1241-1244)

III. ARGUMENT

This Court's October 27, 2000 decision focuses on the procedural question of whether the trial judge's August

7, 1998 remittitur order was "void" and concludes correctly that Sparks is not entitled to reinstatement of the initial $1.15 million jury verdict.

As regards Cash America's substantive cross-appeal, however, Cash America respectfully submits that this Court's decision in incorrect and unclear. The Court's reliance on *Talent Tree Personnel Services, Inc. v. Fleenor*, 703 So. 2d 917 (Ala. 1997), clearly is misplaced. The facts of the instant case affirmatively demonstrate that Sparks did not prove his case and that the Court did not strictly scrutinize Sparks's mental anguish award. Further, by affirming Sparks's breach of contract "and/or" suppression claim(s), this Court has created uncertainty as to what claims were affirmed based on what evidence.

1. *Talent Tree v. Fleenor* does not apply

The *Talent Tree* case is a breach of contract and fraud case brought because the defendant intentionally cheated the plaintiff out of significant *earned sales commissions* payable based on a percentage of sales. This Court noted, "most of [Fleenor's] salary came from commissions that she earned . . . " *Talent Tree*, 703 So. 2d at 919. The Legislature has enacted a statute to protect a salesperson's right to a commission, *Ala. Code* § 8-24-1 *et seq.* (1975).

Sparks's claims, by contrast, are based on a discretionary incentive bonus plan. This Court should apply the well settled Alabama law applicable to incentive bonus plans, or risk turning this aspect of Alabama employment law on its head.

2. Law applicable to incentive bonus plans

Incentive bonus plans which are based at least in part on the employer's discretion, such as the 1994 Kuntz plan under which Sparks has sued, are unenforceable executory obligations and will not support an action. *Elmore, Quillian & Co. v. Parish Bros.*, 170 Ala. 499, 54 So. 203 (1911); *Patterson v. Brooks*, 285 Ala. 349, 232 So. 2d 598 (1970); *Johnson v. Merrill Lynch, Pierce, Fenner & Smith*, 294 So. 2d 56 (Ala. Civ. App. 1981).

In Alabama, an employee cannot enforce an employer's promise to pay an incentive bonus unless the bonus is for a *specified sum certain. Mutual Savings Life Ins. Co. v. Montgomery*, 347 So. 2d 1327 (Ala. 1977). Thus, executory contracts to "agree to agree" are not enforceable. *Parish Bros., supra.* The Kuntz bonus plan did not create a contract until, if at all, Sparks received and accepted his $7,500 incentive check. *Patterson v. Brooks*, supra.

Cash America never agreed, and, in fact, specifically refused to pay Sparks an incentive bonus of $24,205; $24,895; or $33,200. Thus, Sparks's breach of contract claim, as well as his fraud claims, must fail as a matter of law.

In *Arbys, Inc. v. Cooper*, 454 S.E. 2d 488 (Ga. 1995), our sister state's highest court reviewed a case presenting the *precise* factual and legal matters as in the case at bar. The Georgia Supreme Court entered judgment for the employer:

> In this case, the basis for rendering certain the bonuses promised to Cooper is at least in part afforded by a future exercise of discretion. In

> such circumstances, the promise to pay a bonus in the future, amounts to a promise to change the terms of compensation in the future and, thus, is an unenforceable executory obligation.

Arby's, 454 S.E. 2d at 489 (emphasis added). The *Arby's* decision is consistent with Alabama law and all of Sparks's claims should be reversed.

3. Sparks's fraud claims cannot be sustained

Under this Court's authority in *Goodyear Tire & Rubber Co. v. Washington*, 719 So. 2d 774 (Ala. 1998); *Martin v. American Medical Int'l, Inc.*, 516 So. 2d 640 (Ala. 1987); *Crowder v. Memory Hill Gardens, Inc.*, 516 So. 2d 602 (Ala. 1987); and *Purcell Co. v. Spriggs Enterprises, Inc.*, 431 So. 2d 515, 519 (Ala. 1983), among other cases, Sparks's (intentional) fraud claims cannot be sustained. Sparks adduced no evidence that he reasonably relied upon a false promise or suppression, and no evidence of any present intent to deceive him. Sparks's fraud claims should be reversed along with his punitive damages verdict.

4. Sparks's mental anguish claim unsupported in the Record

This Court now strictly scrutinizes mental anguish claims in the nonpersonal injury context. *Kmart Corp. v. Kyles*, 723 So. 2d 572 (Ala. 1998). In its October 27, 2000 decision, this Court did not address the dearth of evidence to support Sparks's mental anguish verdict of $125,000 as remitted by the trial court to $50,000. The evidence in the Record demonstrates that Sparks's mental

anguish evidence was scant, at best, and was not corroborated by his treating physician. Cash America respectfully submits that Sparks's mental anguish verdict should be reversed based on *Kmart Corp. v. Kyles, supra.*, or substantially remitted below $50,000 with a concomitant reduction in the punitive award.

IV. CONCLUSION

Based on the foregoing, Cash America requests a rehearing on its cross-appeal. At the very least, Cash America requests clarification as to which of Sparks's claims have been sustained, based on what evidence, and which claims are subject to a re-trial. Cash America respectfully requests such other, further and different relief as justice may require.

Respectfully submitted,

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